

Message Text

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SUBJECT: GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, U.S. REVISIONS TO WORKING PARTY 11 DOCUMENT NUMBER 37 (2ND REVISION)

1. PLEASE PASS FOLLOWING TEXT OF U.S. REVISIONS OF

WORKING PARTY 11 DOCUMENT NUMBER 37 (SECOND REVISION) TO ANDRE DENUIT, OECD SECRETARIAT. U.S. DELEGATION REGRETS LATE SUBMISSION BUT HOPES THERE WILL BE SUFFICIENT TIME TO PREPARE ITS PROPOSED CHANGES FOR THE NEXT WORKING PARTY 11 MEETING.

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2. INSERT BETWEEN PRESENT PARAGRAPHS 9 AND 10 THE FOLLOWING NEW PARAGRAPH:

QTE IT DOES NOT APPEAR THAT EITHER ABUSE CONTROL OR CONSPIRACY LEGISLATION SHOULD BE DIRECTED AT PURELY INTRA-CORPORATE CONDUCT PER SE. COMPETITION LAWS AND POLICIES

IN THE OECD MEMBER NATIONS GENERALLY PROVIDE THAT INTRA-ENTERPRISE PRACTICES SUCH AS ALLOCATION OF FUNCTIONS AMONG BRANCHES OR SUBSIDIARIES OF A SINGLE ENTERPRISE ARE NOT CONSIDERED IN THEMSELVES AS AN UNREASONABLE RESTRAINT OF TRADE OR ABUSE OF A DOMINANT POSITION. IN NO CASE HAVE ARRANGEMENTS WITHIN THE SAME LEGAL ENTITY BEEN HELD TO CONSTITUTE IN THEMSELVES AN UNLAWFUL AGREEMENT. HOLDING SUCH PRACTICES UNLAWFUL WOULD BE LIKELY TO DISCOURAGE INTERNAL GROWTH AND DECREASE EFFICIENCY. IT MIGHT ALSO FORCE UPON COMPETITION AUTHORITIES THE UNDESIRABLE AND IMPRACTICABLE TASK OF SEEKING TO CREATE AND MAINTAIN VIGOROUS COMPETITION WITHIN A SINGLE ENTERPRISE ON AN ONGOING BASIS.

-- EVEN IN CASES INVOLVING SEPARATE LEGAL ENTITIES UNDER COMMON CONTROL, FINDINGS OF ILLEGALITY HAVE BEEN RARE, AND HAVE BEEN BASED UPON EXHAUSTIVE FACTUAL ANALYSIS OF THE PARTICULAR CASES. IN CERTAIN INSTANCES OF ARRANGEMENTS BETWEEN LEGALLY SEPARATE ENTITIES WITH PARTIAL COMMON OWNERSHIP WHICH ELIMINATED SIGNIFICANT PRE-EXISTING OR POTENTIAL COMPETITION OR DIRECTLY INJURED PERSONS OUTSIDE THE ENTERPRISE BY MEANS, FOR INSTANCE, OF AGREED REFUSALS TO DEAL, ILLEGALITY HAS BEEN FOUND. END QTE

3. SUBSTITUTE THE FOLLOWING TEXT FOR PRESENT PARA 12:

QTE A FURTHER POSSIBILITY FOR ACTION BY GOVERNMENTS RELATES MORE SPECIFICALLY TO ANTITRUST PROCEDURE. ONE OF THE CENTRAL PROBLEMS IDENTIFIED IN THIS REPORT IS THAT OF COLLECTING RELEVANT INFORMATION CONTROLLED BY A MULTINATIONAL ENTERPRISE WHICH IS LOCATED OUTSIDE THE NATIONAL TERRITORY, FOR PURPOSES OF AN INVESTIGATION OF CONDUCT AFFECTING THE JURISDICTION. ONE OF THE ELEMENTS CONTRI-

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BUTING TO THIS PROBLEM IS THE VERY NATURE OF THE MULTINATIONAL ENTERPRISE, WHICH IS GENERALLY COMPOSED OF UNITS SOME OF WHICH ARE OUTSIDE THE TERRITORY OF ANY ONE STATE. ADDITIONAL PROBLEMS MAY BE CREATED BY THE RELUCTANCE OF ENTERPRISES TO COOPERATE IN PROVIDING SUCH INFORMATION. ANOTHER IS THE EXISTENCE IN SOME STATES OF LEGISLATION OR POLICIES WHICH PRECLUDE AN ENTERPRISE FROM PROVIDING BUSINESS-RELATED INFORMATION TO FOREIGN GOVERN-

MENTS. IT THEREFORE SEEMS APPROPRIATE THAT COUNTRIES SHOULD CONSIDER STRENGTHENING NATIONAL POWERS WITH A VIEW TO ENHANCING THEIR ABILITY TO OBTAIN RELEVANT INFORMATION WHICH IS OUTSIDE OF THEIR TERRITORY BUT IS WITHIN THE CONTROL OF THE MNE CONCERNED AND IS NECESSARY TO THE ENFORCEMENT OF NATIONAL ANTITRUST LAWS. AN APPROPRIATE LEGAL TEST FOR DEMANDING SUCH DOCUMENTS IS WHETHER THE PARENT OR SUBSIDIARY OUTSIDE THE JURISDICTION AND ITS AFFILIATE IN THE JURISDICTION BOTH PARTICIPATED ACTIVELY IN THE TRANSACTION BEING INVESTIGATED, OR WHETHER THE FOREIGN PARENT ACTIVELY SUPERVISED A LOCAL AFFILIATE WHICH DID PARTICIPATE. ANOTHER POSSIBILITY FOR ACTION

BY GOVERNMENTS TO AMELIORATE THIS PROBLEM WOULD BE APPROPRIATE MODIFICATION OF NATIONAL LAWS PREVENTING DISCLOSURE OF RELEVANT INFORMATION BY OR CONCERNING MNE'S SO AS TO ALLOW DISCLOSURE TO COMPETENT ANTITRUST AUTHORITIES OF OTHER COUNTRIES UNDER PROPER PROCEDURES AND SAFEGUARDS. END QTE

4. INSERT BETWEEN PRESENT PARAGRAPHS 19 AND 20 THE FOLLOWING NEW PARAGRAPH:

QTE IN ACCORDANCE WITH THE CONCLUSIONS SET FORTH IN PARAGRAPH 10, ABOVE, IT APPEARS THAT THE PRESENT RULINGS APPLYING TO INTRA-CORPORATE ARRANGEMENTS IN THOSE JURISDICTIONS WHICH HAVE DEALT WITH THE PROBLEM HAVE STRUCK THE NECESSARILY DELICATE BALANCE BETWEEN UNDUE INTERFERENCE WITH THE INTERNAL AFFAIRS OF INDIVIDUAL ENTERPRISES AND AVOIDANCE OF DISGUISED CARTELS. ACCORDINGLY, THE COMMITTEE HAS NO CHANGES TO RECOMMEND AT THIS TIME IN THE SUBSTANCE OR APPLICATION OF SUCH RULES WITH RESPECT TO MULTINATIONAL ENTERPRISES. END QTE
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5. AT THE END OF THE PRESENT PARAGRAPH 20, ADD THE WORDS, "AND UNDER WHAT SAFEGUARDS". ROBINSON

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